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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. [redacted] 198

JOHN T. BOURN, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD AND N. E. HALABY, *Administrator, Federal Aviation Agency.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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The petitioner, John T. Bourn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Civil Aeronautics Board on review.

Opinion Below

The Court below did not render a written opinion. The judgment of the Court is appended hereto as Appendix A.

Jurisdiction

The jurisdiction of the court is invoked pursuant to the provision of Sec. 1486 (f), 49 U.S.C. of the Federal Aviation Act of 1958, and as further provided in Tit. 28, U.S.C.,

Sec. 1254 (1). The judgment of the court is dated March 24, 1964 and entered the same day.

Questions Presented

The questions presented are:

1. Whether the Administrator of the Federal Aviation Agency could legally obtain evidence by invoking the use of the Federal Rules of Civil Procedure adopted by this Court for use only by the District Courts of the United States.

2. Whether such use was in violation of the due process of law clause in the Constitution of the United States.

3. Whether such use was detrimental to the property rights of petitioner.

4. Whether the respondents below violated procedural due process of law in revoking petitioner's certificates in which he had vested property rights.

Constitutional Provision, Statute, and Federal Rule of Civil Procedure 36 Involved

Amendment V, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U.S.C. Tit. 28 Secs. 723 b, 723 c, read, as follows:

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules; for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U.S.C., Title 28, §§ 723b, 723c.]

Federal Rule of Civil Procedure No. 36 reads as follows:

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(b) EFFECT OF ADMISSION. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Statement of the Case

Petitioner is the holder of commercial pilot and flight instructor certificates issued by the Administrator of the Federal Aviation Agency, which were revoked by the regional counsel for the Administrator on August 4, 1961,

effective August 23, 1961. On September 12, 1961, the examiner advised petitioner by letter, informing him that from the Rules of Practice on Safety proceedings he could see that his appeal is a *legal proceeding* "in which both sides present evidence to a hearing examiner who acts as a Judge does at a trial. At the outset of this so-called "trial" the examiner received in evidence, without objection, "Requests for Admission Under F.R.C.P. 36," comprising six pages containing fifty-five questions. The said requests covered substantially the entire charges made against petitioner in the revocation order signed by said counsel. Petitioner herein wrote his answers on the margins thereof. In addition, the examiner held "trials" for seven days, making a record of almost 1200 pages. About six months later he issued an "Initial Decision." It is not known whether such decision was based on, and contained its findings of fact, from the information illegally elicited by the use of Federal Rulcs of Civil Procedure 36; or from the testimony obtained at the seven days of hearings. On appeal by petitioner, the Civil Aeronautics Board upheld the findings of the examiner and the use of said federal rule of civil procedure.

Reasons for Granting the Writ

This case presents the important question whether an examiner can act as a federal district court judge and invoke the use of the Federal Rules of Civil Procedure, which Congress enacted exclusively for the use of the federal district courts, and gave no authority whatsoever for its use by a federal administrative agency.

1. The lower court, in effect, held that the use of F.R.C.P. 36 was proper, and not illegal, by affirming said order, but wrote no opinion, or decision, in the disposition of the

petition for review filed by petitioner herein. This affirmation was made by the lower court in spite of the fact that it has been held many times that the system of rules of evidence in force for trials by jury, or courts of equity, is *not* applicable, either by historical precedent, or by sound practical policy, to inquiries of *fact* determinable *by administrative tribunals*, or officers. *Federal Trade Comm.* v. *Cement Institute*, 333 U.S. 683, 705, 706; 68 S.Ct. 793; 92 L. Ed. 1009; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; 61 S.Ct. 524; 85 L. Ed. 624; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, 230; 59 S.Ct. 206; 83 L. Ed. 126; *Interstate Commerce Comm.* v. *Baird*, 194 U.S. 25, 44, 24 S.Ct. 563; 48 L. Ed. 860.

2. The lower court erred in holding that petitioner was not denied procedural due process of law by the invocation of F.R.C.P. 36. The Federal Aviation Act of 1958, supra, does not authorize the use of the federal rules of civil procedure in eliciting evidence, or facts, in a hearing by an examiner.

3. Statutory prescribed procedure must be strictly pursued, specifically in regard to *suspension or revocation of a license*. 2 Am Jur 2d, Administrative Law, Sec. 353.

4. The Act of June 19, 1934, supra, prescribed said rules for the district courts of the United States and for the courts of the District of Columbia, and not for use by administrative agencies. The lower court erred in holding that the use of said rule was not in viola. on of due process in procedural requirements; or in violation of procedural due process, it being shown that petitioner's certificates are vested property rights.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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